UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001

DATE: 04/29/97

CASE NO. 95-INA-84

In the Matter of:

ILLINOIS MATHEMATICS AND SCIENCE ACADEMY
Employer

on behalf of

SOON-HENG LIM
Alien

Before: Holmes, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 21, 1992, the Illinois Mathematics and Science Academy ("Employer") filed an application for labor certification, which was amended on September 1, 1993, to enable Soon-Heng ("Alien") to fill the position of "Teacher of Gifted Program College Credit English Courses" (AF 8). The job duties for the position, as stated on the amended application, are as follows:

> The teacher must be able to teach three (3) levels of English in American literature and world literature with the ability to teach one or more electives from the following offerings: "Modern American Prose and Poetry," "The Short Story: Theory and Practice," "Modern World Fiction," "Dramatic Literature, The Theatre as a Microcosm." Faculty are required to participate in co-curricular activities and small student group or individual tutorials. Faculty must participate in discipline team meetings and the development of curriculum materials. Faculty teach four classes daily with required office hours.

(AF 8).

The stated (amended) job requirements for the position are as follows: a Masters degree in English; one year of experience in the job offered or in the related occupation(s) of "college teacher or high school teacher/advancement placement classes." Furthermore, the "Other Special Requirements" section of the application, as amended, included the following notation: "Faculty must have a minimum of one (1) years teaching experience with the gifted population or advanced placement classes at the high school level or a minimum of one years teaching experience at the college level." (AF 8).

According to the report of recruitment results, Employer considered eleven applicants and all were rejected (AF 233-242).

In a Notice of Findings ("NOF") issued on August 17, 1994, the CO proposed to deny certification on the grounds that Employer had rejected two qualified U.S. applicants for other than lawful job-related reasons (AF 222-224).

Employer submitted its rebuttal on or about September 19, 1994 (AF 167-221). The CO found the rebuttal unpersuasive and issued a Final Determination on September 28, 1994, denying certification (AF 164-166).

On October 31, 1994, Employer appealed the denial of certification (AF 1-163), and subsequently the CO forwarded this matter to the Board of Alien Labor Certification Appeals for

review.

On December 9, 1994, Employer filed a "Motion to Supplement Record on Appeal," together with 743 additional pages of documents. In its motion, Employer contends that no prejudice would result if such documentation were accepted, but fails to establish good cause for its failure to submit such evidence while this matter was under the CO's jurisdiction. A review of the additional documents indicates that many of the submissions are already contained in the 652-page record. Finally, it is well settled that our review of the denial of labor certification shall be based on the record upon which the denial was made, the request for review, and legal briefs submitted. 20 C.F.R. §656.26(e). In view of the foregoing, Employer's motion to supplement the record is denied.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Moreover, it is well established that, in general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *See, e.g., Banque Francaise Du Commerce Exterieur*, 93-INA-44 (Dec. 7, 1993); *United Parcel Services*, 90-INA-90 (Mar. 28, 1991); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement. *See, e.g., American Cafe*, 90-INA-26 (Jan. 24, 1991); *Richco Management*, 88-INA-509 (Nov. 21, 1989).

In the report of recruitment results, dated January 10, 1994, Employer stated that it evaluated 11 U.S. applicants, but that none were ready, willing, able, and qualified for the position (AF 233-242). With respect to the two U.S. applicants at issue, Employer stated:

> G. KEITH APPLER
>
> Mr. Appler meets our minimum description. His Ph.D., however, suggests that he has more interest in drama than in the teaching of literature and writing. I doubt seriously how interested he would be in high school teaching or in this school, where there would be little or no opportunity for him to direct major productions. He has no experience of (sic) high school students, and my phone interview makes me doubtful that he would either enjoy high school teaching or [be] particularly suited for it. Our experience has been that those teachers who have no high school teaching experience before coming to IMSA (i.e., whose experience has been exclusively in college teaching) do not fare well here. . ..

(AF 235).

In addition, Employer included notes from a 30-minute telephone interview of Mr. Appler (AF 235, 238-242). In conclusion, the interviewer stated:

> Mr. Appler meets the bare minimum requirements, as described in the ad. Under normal circumstances, he would be a possible candidate. But he really has no experience of high school teaching, no experience of gifted and talented students, no experience of teaching in a residential school, and no grounding in teaching theory. Were he to work at IMSA, he would be the least experienced and, in many ways, the least qualified, of our English faculty. On the other hand, his maturity and experience outside the classroom, his obvious intelligence, and his apparently affable personality would make him--if we were having to find someone at the last moment--a possible candidate. But I have serious doubts either that he would want to stay in high school teaching or that he would be successful.

(AF 242).

> ROBERT G. GARD
>
> Mr. Gard's more recent experience has led him far away from the teaching of literature to gifted high school students. We would not be particularly interested in someone with the high school experience he has had, and the fact that his sustained high school experience is now several years behind him makes his experience less attractive. In any case, there is no evidence that he would be capable of teaching one or more of the specific courses we have listed. His high school experience was not with gifted students or in advanced placement courses, and his one year of college teaching is as an instructor of composition only.

(AF 235).

In the Notice of Findings, the CO stated that Applicants Appler and Gard appear to meet the minimum stated requirements and that Employer, nevertheless, rejected them for subjective and personal reasons. Accordingly, the CO directed the Employer to explain fully the particular reasons why each applicant was rejected. (AF 40-41).

In its rebuttal, Employer stated, in pertinent part, that during a telephone interview, Mr. Appler demonstrated no familiarity or experience with high school teaching; his responses regarding his own experience as a high school student were vague; his selected area of practice in English, *i.e.*, teaching composition, is too narrow; other than possibly dramatic literature, he is not qualified to teach the elective courses listed or the sophomore or junior required courses; and, he is more interested in academic research and publishing such research (AF 168-169). In conclusion, Employer stated:

> The most troublesome of his responses was his answer to the question concerning the differences between college and high school students. The Academy is a unique school, as witnessed by our legislative mandate, with a very complex admissions process of students. Previous faculty who supposed that our students

> were simply "embryonic college students," as Mr. Appler supposed them to be, have not had success at the Academy and left of their own choice or not had contracts renewed. This is an objective fact. Mr. Appler's qualifications on paper appeared to meet the minimum requirements. Further evidence, gathered objectively through the phone interview, did not support his candidacy. Mr. Appler would be the least experienced, least qualified, as evidenced by his responses during the phone interview, and the least committed to the teaching of literature and writing to the Academy students of any teacher we have considered for employment.

(AF 169).

Regarding Applicant Gard, Employer contended that although he is certified in gifted education, his only experience and training in that area is with elementary and middle school gifted students. Further, even though Mr. Gard does have experience as a full-time high school teacher, his last such experience was in 1984-85. Since that time, except for a period in 1988-89 when Applicant Gard split time between teaching and administration, he has worked in other fields. Although Applicant Gard does have experience teaching composition at a community college, that does not establish that he can teach literature at the Academy. Finally, Employer concluded that there is no indication that Applicant Gard has the qualifications or experience to teach the elective courses listed in the advertisement (AF 168).

In the Final Determination, the CO rejected Employer's rebuttal regarding both of the above-referred U.S. applicants. With respect to Applicant Gard, the CO stated:

> The employer's argument is unconvincing. Mr. Gard indicates in his cover letter that he has taught High School English in a public school the past four years, gained an endorsement in the Teaching of the Gifted, completed a program in linguistics which led to a TESOL Certificate, and taught college-level Freshman composition and Business English. His resume indicates that he possesses a Master's degree in English, and has experience as Dean and English Teacher at Santa Fe High School, Writing Instructor at University of Florida Graduate School and the University of Florida English Language Institute, Leader Teacher of Humanities at Tidewater Psychiatric Institute, English Teacher at Cape Henry Collegiate School, and English Teacher at Camden Military Academy.
>
> Mr. Gard has more than one year of teaching experience at the college level and meets the qualifications for the position.

(AF 165).

Regarding the rejection of Applicant Appler, the CO stated, in pertinent part:

> The employer fails to state lawful job related reasons for rejection which were based on Mr. Appler's failure to meet the stated qualifications. The employer's stated reasons remain vague and subjective and do not address Mr. Appler's failure to meet the qualifications for the position. Mr. Appler's resume indicates that he possesses a Master's degree in English, has experience teaching courses at the University of Illinois, such as, Introduction to American Literature, Introduction to Fiction, Freshman Rhetoric, and Playwriting.
>
> Mr. Appler meets the qualifications for the position.

(AF 166).

In view of Employer's failure to demonstrate lawful, job-related reasons for rejecting the foregoing U.S. applicants, the CO determined that the Employer is in violation of § 656.21(b)(6) and that the application cannot be certified.

We agree. The crux of this case is that the above-referenced U.S. applicants meet the stated job requirements and that, nevertheless, Employer rejected them. In fact, Employer acknowledged that Mr. Appler meets such requirements. *See, e.g., Jacob Camrad*, 92-INA-379 (July 28, 1993). Furthermore, the Employer cannot reject U.S. workers for lack of experience in each listed duty, where, as here, there is an alternative experience requirement. *See, e.g., Total Building Maintenance, Inc.*, 90-INA-473 (Apr. 12, 1993).

As outlined above, Employer has also contended that the U.S. applicants are not qualified because of various other reasons, such as: the experience teaching high school on a full-time basis was ten years ago (Gard); or that the applicant's statement describing high school students as "embryonic college students" indicates that he would not be successful at the Academy (Appler); or that the applicant's primary interest is in academic research rather than teaching (Appler). As stated by the CO, we find all such reasons to be highly subjective. *See, e.g., Lyndhurst Trading Corp.*, 93-INA-37 (Mar. 25, 1994); *Kem Medical Products Corp.*, 91-INA-196 (June 30, 1992); *Spanish American Institute*, 92-INA-280 (July 1, 1993).

In addition to the rebuttal arguments outlined above, Employer submitted extensive documentation, which indicates that the Alien, Mr. Lim, is an outstanding person, an excellent teacher, and an invaluable asset to the Academy.

While we acknowledge that the Alien appears to be well qualified for the job opportunity and that he may even be better qualified for the position than either of the two U.S. applicants, it is well settled that an employer cannot reject U.S. applicants on that basis. *K Super KQ 1540-A.M.*, 88-INA-397 (Apr. 3, 1989)(*en banc*); *Morris Teitel*, 88-INA-9 (Mar. 13, 1989)(*en banc*).

Finally, we note that much of Employer's argument, in its brief, relates to the alleged improper action of the Illinois Labor Department in compelling Employer to reduce its stated

minimum requirements for the job offer (Employer's brief, pp. 4-7). Upon review, we find that Employer's statements regarding this issue are not relevant to the determination herein. If, as Employer now argues, the actual minimum requirements are greater than those stated on the application, as amended, Employer should not have agreed to amend the application. Instead, Employer should have sought to establish the business necessity for the higher requirements. If such business necessity were established, Employer could, then, have proceeded with a recruitment based upon those higher requirements. On the other hand, if the CO determined that the higher requirements were unduly restrictive and denied certification, Employer could, then, have appealed on that basis. However, having agreed to reduce the requirements, Employer cannot reject qualified U.S. applicants, who meet the amended requirements, based upon its contention that they would not have been qualified based upon the original requirements.

In summary, we find that the above-referred U.S. applicants meet the minimum stated job requirements, as amended, and are qualified for the position offered. Accordingly, Employer rejected the U.S. applicants for other than lawful, job-related reasons. Therefore, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel:

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Todd R. Smyth, Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary

to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

Judge Holmes, concurring in part and dissenting in part.

Under normal circumstances in a case with similar facts, I would fully endorse the majority opinion. There appears to be an unusually high number of qualified willing and able U.S. worker

applicants for this job opportunity. Indeed, my understanding of the labor market is that there is a huge surplus of teachers of English or American literature, many of whom have taught courses for gifted children.

Nevertheless, I am troubled that the certification process may be infringing on the rights of the State of Illinois in violation of our federalist system. The school is chartered by specific legislation of the Illinois legislature. I would, therefore, remand this matter for the CO to allow the Illinois legislature to specify that the job description outlined is that which the legislature had envisioned in establishing this special institution.

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JOHN C. HOLMES
Administrative Law Judge